(1)

Supreme Court, U.S.
FILED

02 1715 MAY 19 2003

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

DAVID PEGASUS AND BEVERLY PEGASUS, INDIVIDUALS, D/B/A SALSA DAVE'S,

Petitioners,

v.

RENO NEWSPAPERS, INC., D/B/A RENO GAZETTE-JOURNAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

William P. Farley
Counsel of Record
John F. Karl, Jr.
McDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200
Attorney for Petitioners

CURRY & TAYLOR • (202) 393-4141 • HTTP://URSCINFO.COM

72 pp

QUESTIONS PRESENTED

1. Whether all persons who provide public accommodations and seek public patronage are limited purpose public figures under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)?

2. What is the extent that a business review is a matter of "public concern" entitled to protections of the First Amendment for purposes of defamation law?

3. Whether a business review is constitutionally protected speech as a matter of law?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that Salsa Dave's has no parent companies or subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 7

A. Introduction and Summary 2
B. Background of the Case 4
C. Proceedings Below 5

1. Nevada District Court 5
2. Nevada Supreme Court 5

I. THE NEVADA SUPREME COURT'S "LIMITED PUBLIC FIGURE TEST" CONFLICTS WITH THIS COURT'S TEACHINGS AS WELL AS OTHER STATES AND FEDERAL CIRCUITS 9

A. The Nevada Decision Conflicts with This Court's Rulings 9
B. There Is Conflict Between the States and Circuits 12
C. The Conflict Is Important 18

II. THERE IS A SPLIT BETWEEN THE NEVADA SUPREME COURT AND OTHER STATE COURTS IN DETERMINING WHAT IS A "MATTER OF PUBLIC CONCERN" FOR PURPOSES OF DEFAMATION 19

A. The Issue 19
B. The Conflict 21
C. The Conflict is Important 24

III. RESTAURANT REVIEWS OF A FACTUAL NATURE SHOULD NOT BE PROVIDED CONSTITUTIONAL PROTECTIONS FOR DEFAMATORY STATEMENTS ... 25

A. The Issue 25
B. The Conflict 27
C. The Conflict Is Important 29

CONCLUSION 30

APPENDIX

Supreme Court of Nevada Order 1a

Order Denying Rehearing 27a

Supreme Court of Nevada Remittitur 29a

Order Granting Motion for Summary Judgment 33a

TABLE OF AUTHORITIES

CASES

Bank of Oregon v. Independent News, Inc., 693 P.2d 35 (Or. 1985), cert. denied, 474 U.S. 826 (1985).....16

Beauharnais v. Ill., 343 U.S. 250 (1952) 23

Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir.1989) 17

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 17

Buckley v. Littell, 539 F.2d 882 (2d Cir.1976), cert. denied, 429 U.S. 1062 (1977).....29

Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).....12

Dairy Stores, Inc. v. Sentinel Publ'g Co., 516 A.2d 220 (N.J. 1986) 17

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).....19

Garrison v. Louisiana, 379 U.S. 64 (1964) 3

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)... Passim

Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317 (Conn. 1982).....27

Greer v. Columbus Monthly Publ'g Corp., 448 N.E.2d 157 (Ohio Ct. App. 1982).....15, 25, 29

Harte-Hanks Communications, Inc., v. Connaughton, 491 U.S. 657 (1989) 26

Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W. Va. 1981) 5, 13

Haworth v. Feigon, 623 A.2d 150 (Me. 1993) 16

Hotchner v. Castillo-Puche, 551 F.2d 910 cert. denied, 434 U.S. 834 (1977) 26

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) ... 3

Hutchinson v. Proxmire, 443 U.S. 111 (1979) .. 10, 11, 12, 20

Jadwin v. Minneapolis Star & Tribune, 390 N.W.2d 437 (1986) 16

Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446 (Ind. 1999) 21

Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123 (2d Cir. 1984), cert. denied, 471 U.S. 1054 (1985) 15

Long v. Cooper, 848 F.2d 1202 (11th Cir. 1988) 17
Marbury v. Madison, 5 U.S. 137 (1803) 22

Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072 (3d Cir. 1984), cert. denied, 474 U.S. 864 (1985) ... 15

Mashburn v. Collin, 341 So.2d 1236 (La. Ct. App. 1976), rev'd on other grounds, 355 So.2d 879 (La. 1977) 13, 14

Mashburn v. Collin, 355 So.2d 355 So.2d 879 (La. 1977) 13, 27

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990 ..3, 24, 25, 27

Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985).....15, 25, 29

N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964 .....3, 11

Pegasus v. Reno Newspapers, Inc., 57 P.3d 82 (Nev. 2002)..... Passim

Pennekamp v. Florida, 328 U.S. 331 (1946) 9

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1985) 3, 24

Pritsker v. Brudnoy, 452 N.E.2d 227 (Mass. 1983)..28, 29

Rety v. Green, 546 So.2d 410 (Fla. Dist. Ct. App. 1989), review denied, 553 So.2d 1165 (Fla.1989).....14, 21, 22

Rosenblatt v. Baer, 383 U.S. 75 (1966) 2, 9, 10

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)...22, 23

Shaari v. Harvard Student Agencies, Inc., 691 N.E.2d 925 (Mass. 1998) 16

Silence v. Journal Star Printing Co., 266 N.W.2d 533 (Neb.1978) 14

Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1329 (5th Cir. 1993), cert. dismissed, 511 U.S. 1050 (1994)....13

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir.1980) 18

Terillo v. New York Newsday, 519 N.Y.S.2d 914 (N.Y. 1987).....23, 29

Time, Inc. v. Firestone, 424 U.S. 448 (1976).....10, 23, 24
Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C.Cir. 1980), cert. denied, 449 U.S. 898 (1980) 15, 18, 23

Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979).....10, 11

STATUTES/CONSITUTIONAL PROVISIONS

28 U.S.C. § 1257(a) (2003).....2

U.S. CONST. AMEND. I..... Passim

OTHER AUTHORITIES

Tracey A. Bateman, *Who Is "Public Figure" for Purposes of Defamation Action*
19 A.L.R.5th 1 (1994).....8

Nancy K. Bowman, *Milkovich Meets Modern Federalism in Libel Law: the Lost Opinion Privilege Gives Birth to Enhanced State Constitutional Protection*, 42 DEPAUL L. REV. 583 (1992).....7

Margaret Chan, *The Importance of a Contextual Approach to Libel Law: the Impact of Immuno Ag. V. Moor-Jankowski and Milkovich v. Lorain Journal Co.*, 9 TOURO L. REV. 611 (1993).....7

Defining "Public Concern" in Defamation Cases since Dun & Bradstreet v. Greenmoss Builders, 43 FED. COMM. L.J. 1 n.8 (Dec. 1990).....17

Defining the Limited Purpose Public Figure, 70 U. Det. Mercy L. Rev. 47, 54 (1992) 20

Michael Greene, *Dun & Bradstreet v. Greenmoss: Cutting Away the Protective Mantle of Gertz*, 37 HASTINGS L.J. 1171(1986) 7

Lisa Herskowitz, *One Bad Bit of Dictum Deserves Another: Gertz and Milkovich*, 24 CONN. L. REV. 1159 (1992) 7

Lewis H. LaRue, *Living with Gertz: a Practical Look at Constitutional Libel Standards*, 67 VA. L. REV. 287 (1981) 7

James C. Mitchell, *The Accidental Purist: Reclaiming the Gertz All Purpose Public Figure Doctrine in the Age of "Celebrity Journalism,"* 22 LOY. L.A. ENT. L. REV. 559 (2002) 7

W. Oates & D. Gordon, The Revived 'Public Concern' Factor in Libel: Variability in Editors' Judgments 11, Paper presented to the AEJMC Southeast Regional Colloquium, Blacksburg, Va. (Mar. 1987).....17

Mary-Jo Perella, *Constitutional Law–First Amendment–Defamation–Libel–The United States Supreme Court Has Held That Private Figure Plaintiff Alleging Defamation Has the Burden of Proving Falsity of Media Defendant's Speech on Matters of Public Concern. Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558*, 25 DUQ. L. REV. 1075 (1987).....7

ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS (3d ed. 2003)..... Passim

RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.08, at 2-23 (1993) 9, 22

Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467 (1994)7

Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1030 (Winter 1996) 9

Deeann M. Taylor, *Dun & Bradstreet, Hepps and Milkovich: the Lingering Confusion in Defamation Law*, 1992/1993 ANN. SURV. AM. L. 153 (1993).....7

Thomas J. Tracy, *"Thou Shalt Not Use His Name in Vain"--the Misapplication of Milkovich v. Lorain Journal: Spence v. Flynt*, 26 CREIGHTON L. REV. 1221 (1993).....7

Russ VerSteeg, *Slander & Slander Damages after Gertz and Dun & Bradstreet*, 38 VILL. L. REV. 655 (1993).....7

Mark D. Walton, *the Public Figure Doctrine: a Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. ILL. U. L. REV. 141 (1995).....7

Gary Williams, *California's Constitutional Right to Privacy: Can it Protect Private Figures from the Unauthorized Publication of Confidential Medical Information?*, 18 LOY. L.A. ENT. L.J. 1 (1997) 7

John C. Williams, Annotation, *Liability for Defamation for Criticizing Restaurant's Food*, 96 A.L.R. 3D 609 (1979 & Supp. 2003) 8

PETITION FOR A WRIT OF CERTIORARI

Petitioners, David Pegasus and Beverly Pegasus, doing business as Salsa Dave's, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Nevada in this case.

OPINIONS BELOW

The Supreme Court of the State of Nevada's Order Denying En Banc Reconsideration (App. at 27a-30a) is unreported. The opinion of the Supreme Court of the State of Nevada (App. at 1a-26a) is reported at 57 P.3d 82. The decision of the Nevada Second Judicial District Court, Washoe County, (App. at 31a-33a) is unreported.

JURISDICTION

The Supreme Court of the State of Nevada denied Petitioners' timely petition for rehearing en banc on February 20, 2003 (App. at 27a-30a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2003).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. CONST. Amend. I.

STATEMENT

A. Introduction and Summary

This case raises important questions of defamation and constitutional law. This petition presents three issues on which the highest courts of various states, as well as the federal circuits, are sharply divided. First, whether all persons who provide public accommodations and seek public patronage are limited purpose public figures under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)? Second, to what extent is a business review a matter of "public concern" entitled to protections of the First Amendment for purposes of defamation law? Third, whether a "restaurant review" is constitutionally protected speech as a matter of law?

The first question is whether business owners, particularly restauranteurs, who provide public accommodations and seek public patronage are public figures. This important issue must be answered to allow not only lower courts but also the media to determine the constitutional status of restaurants and other businesses. The importance of determining the constitutional status of the party will determine the constitutional protections that will be provided to otherwise defamatory statements. The highest courts in some states have determined that restaurants are "private persons" for purposes of First Amendment defenses to defamation. Other states have determined that restaurants are "limited purpose public figures." Whether an individual is a public figure is a matter of law. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966).

The second question is to what extent should a business review be deemed a matter of "public concern" entitled to protections of the First Amendment for

purposes of defamation law? The matter of public concern in this case included a claim that there was a can of name brand beans on a shelf. Speech constituting a matter of public concern has never been so broadly defined. Public concern consists of matters so important that the law permits every citizen to speak his mind and "every newspaper express its view on matters of public concern." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 298-99 (1964) (Goldberg, J., concurring). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government * * * debate on public issues should be uninhibited, robust, and wide-open * * *" *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (quoting *N.Y. Times*, 376 U.S. at 270).

The third question is whether a restaurant review is protected speech as a matter of law, affording reviewers enhanced constitutional protections for their speech. This Court has recognized that a separate constitutional privilege for "opinion" was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990) (dismissing notion of opinion exception to defamation claims). Significant constitutional protections are already recognized, including the requirement that the plaintiffs prove falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (applying common law rule of proving falsity to constitutional claims). Statements that cannot "reasonably [be] interpreted as stating actual facts" are protected. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (affirming lower court's decision that ad parody of public figure was not "reasonably believable").

B. Background of the Case

Petitioners, David and Beverly Pegasus, owned and operated Salsa Dave's, a Mexican-American restaurant in Sparks, Nevada. In September 1998 and April 1999, the Respondent published favorable restaurant reviews of Salsa Dave's. Thereafter, one of Respondent's editors for the food section wrote reviews or articles generally criticizing the use of canned beans or packaged ingredients in many Mexican-American restaurants. That editor gave tips on identifying an authentic Mexican restaurant. *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 85 (Nev. 2002).

Subsequent to the editor's articles, the Respondent published a third food review of Salsa Dave's criticizing the freshness of Salsa Dave's food and indicated that the author saw a name brand can of pinto beans in the kitchen while paying for her meal. *Id.* The Respondent's article included an allegation that Salsa Dave's Mexican food "was definitely not the real deal" and that "all of this came out of some sort of package." *Id.* at 89. After this last review, Salsa Dave's business plummeted. The Petitioners sued the Respondent in the Nevada state courts alleging that Respondent's review constituted defamation.

During discovery, Respondent moved for summary judgment. The Nevada State district court granted the Respondent's motion, concluding that the review contained only a statement of opinion and was not actionable. App. at 32a. In addition, the district court found that Salsa Dave's was a public figure for the limited purpose of a food review. *Id.* The district court also found that the Pegasuses had the burden of proving "actual malice." *Id.* Finally, the district court determined that no facts existed to suggest "actual

malice" on the part of the Respondent. *Id.* On November 7, 2002, the Nevada Supreme Court decided in a matter of first impression that restaurant owners' are limited purpose public figures by virtue of providing public accommodations and seeking public patrons. *Pegasus*, 57 P.3d at 92.

This case involves questions of exceptional importance affecting citizens of several states and concerns the consistent application of constitutional principles and privileges. Courts have made inconsistent determinations of constitutional protections to be afforded business reviewers and recovery for restaurant owners that have been defamed. See, *e.g.*, *Havalunch, Inc. v. Mazza*, 294 S.E.2d 70, 73 (W. Va. 1981) (finding "plaintiff restaurant to be a private person needing to prove only negligence").

C. Proceedings Below

1. Nevada District Court

In the Second Judicial District Court of the State of Nevada in and for the County of Washoe, that court granted summary judgment against Petitioners finding as a matter of law that Salsa Dave's was a public figure for the limited purpose of a food review. App. at 32a. That court also held that the Respondent's restaurant review is a publication of opinion and therefore not actionable as a matter of law. *Id.* at 32a.

2. Nevada Supreme Court

The Nevada Supreme Court affirmed and determined that Petitioners were "limited purpose public figures" and the Respondent's review of Salsa Dave's goods and services were a matter of "public

concern." *Pegasus*, 57 P.3d at 92. Specifically, that court held that: (1) comment contained in restaurant review is not automatically protected opinion; (2) review commenting upon restaurant's food constituted nonactionable opinion; (3) in determining what constitutes a public figure in defamation action, it is preferable to look to nature and extent of individual's participation in particular controversy giving rise to alleged defamation, and absent clear evidence of general fame and notoriety in community and pervasive involvement in affairs of society, individual should not be deemed public personality for all aspects of his or her life; (4) restaurant constituted limited-purpose public figure, thereby requiring owners to prove "actual malice" against publisher; and (5) evidence was insufficient to support finding of "actual malice." *Id.* at 82.

The Nevada Supreme Court found that a place of public accommodation which "voluntarily injected itself into the public concern for the limited purpose of reporting on its goods and services" is a limited purpose public figure as to those goods and services. *Id.* at 92. That court found Salsa Dave's constituted a "limited-purpose public figure because it has voluntarily entered the public spectrum by providing public accommodation and seeking public patrons." *Id.*

The Nevada Supreme Court concluded "that restaurant owners, operating a place of public accommodation, have injected themselves into the public arena for purposes of a food review." *Id.* at 85. Once Salsa Dave's was part of the public arena or spectrum, that court determined that the review of the food was a matter of public concern. *Id.* at 85.

REASONS FOR GRANTING THE WRIT

The Nevada Supreme Court's decision in this case highlights the split in the lower courts' application of First Amendment constitutional protections in defamation cases. Review of this case should also be granted in order for this Court to provide guidance so courts and the media will consistently determine the standards for classifying public and private figures. Many treatise and law review authors have recognized the problems courts have in determining these issues.[1]

---

[1] See e.g. James C. Mitchell, *The Accidental Purist: Reclaiming the Gertz All Purpose Public Figure Doctrine in the Age of "Celebrity Journalism,"* 22 LOY. L.A. ENT. L. REV. 559 (2002); Mark D. Walton, *the Public Figure Doctrine: a Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations,* 16 N. ILL. U. L. REV. 141 (1995); Russ VerSteeg, *Slander & Slander Damages after Gertz and Dun & Bradstreet,* 38 VILL. L. REV. 655 (1993); Lisa Herskowitz, *One Bad Bit of Dictum Deserves Another: Gertz and Milkovich,* 24 CONN. L. REV. 1159 (1992); Michael Greene, *Dun & Bradstreet v. Greenmoss: Cutting Away the Protective Mantle of Gertz,* 37 HASTINGS L.J. 1171(1986); Lewis H. LaRue, *Living with Gertz: a Practical Look at Constitutional Libel Standards,* 67 VA. L. REV. 287 (1981); Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later,* 3 WM. & MARY BILL RTS. J. 467 (1994); Thomas J. Tracy, *"Thou Shalt Not Use His Name in Vain"--the Misapplication of Milkovich v. Lorain Journal: Spence v. Flynt,* 26 CREIGHTON L. REV. 1221 (1993); Deeann M. Taylor, *Dun & Bradstreet, Hepps and Milkovich: The Lingering Confusion in Defamation Law,* 1992/1993 ANN. SURV. AM. L. 153 (1993); Margaret Chan, *The Importance of a Contextual Approach to Libel Law: the Impact of Immuno Ag. v. Moor-Jankowski and Milkovich v. Lorain Journal Co.,* 9 TOURO L. REV. 611 (1993); Nancy K. Bowman, *Milkovich Meets Modern Federalism in Libel Law: The Lost Opinion Privilege Gives Birth to Enhanced State Constitutional Protection,* 42 DEPAUL L. REV. 583 (1992); Mary-Jo Perella, *Constitutional Law–First Amendment–Defamation–Libel–The*

Review of this case should also be granted in order for this Court to provide guidance to the lower courts to balance the rights a person has to a good name with the constitutional protections our freedoms require.

The Nevada Supreme Court's broad, open-ended approach to public figure status stands as authority for other state and federal courts. Although the *Pegasus* decision does not provide a proper framework for determining constitutional protections, this Nevada decision is already being reported in many treatises. See e.g., ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 4-29, 5-33, 5-65, 5-69 (3d ed. 2003)[hereinafter SACK] (noting that *Pegasus* and *Mashburn v. Collin*,341 So.2d 1236 (La. Ct. App. 1976), rev'd on other grounds, 355 So.2d 879 (La. 1977) have made contrary decisions concerning the constitutional status of unfavorably reviewed restaurant owners); 19 A.L.R.5th, § 6(a) (1994); John C. Williams, Annotation, *Liability for Defamation for Criticizing Restaurant's Food*, 96 A.L.R. 3D 609 (1979 & Supp. 2003) ("Newspaper journalist's comment in restaurant review that existence of can of beans in restaurant confirmed journalist's opinion that food was pre-packaged was substantially true, thereby constituting expression of opinion when taken in context of entire review, and thus, statement was not actionable, in restaurant's defamation action against

---

United States Supreme Court Has Held That Private Figure Plaintiff Alleging Defamation Has the Burden of Proving Falsity of Media Defendant's Speech on Matters of Public Concern. Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 25 DUQ. L. REV. 1075 (1987); and Gary Williams, *California's Constitutional Right to Privacy: Can it Protect Private Figures from the Unauthorized Publication of Confidential Medical Information?*, 18 LOY. L.A. ENT. L.J. 1 (1997).

newspaper publisher; owners admitted that canned beans were kept on premises, and reasonable person would have understood statement to be expression of journalist's belief that canned beans had been used in preparation of food, rather than statement of fact.")

The petition should also be granted so this Court can provide the necessary guidance to lower courts, allowing for a uniform application of constitutional protections in the context of "public concern" and the applicability of opinion versus facts for purposes of a business review.

I.
THE NEVADA SUPREME COURT'S "LIMITED PUBLIC FIGURE TEST" CONFLICTS WITH THIS COURT'S TEACHINGS AS WELL AS OTHER STATES AND FEDERAL CIRCUITS

A. The Nevada Decision Conflicts with This Court's Rulings

The application of constitutional privileges for defamation should be uniform, however, applying the privilege varies among several states. Such a variance denies citizens equal privileges under the constitution. *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946); *Rosenblatt*, 383 U.S. at 84. The Supreme Court has "final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues * * * [W]hether [those issues] are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp*, 328 U.S. at 335.

A party's constitutional status as a private or

public figure must be determined under a national constitutional framework to ensure all citizens are given equal First Amendment protections.[2] See, *e.g.*, *Rosenblatt*, 383 U.S. at 84 (determination of "public official" must be made under a national framework because the "standards that set the scope of its [constitutional protections afforded free expression] principles" cannot vary between states). Whether an individual is a public figure is a question of law for the court to resolve. *Rosenblatt*, 383 U.S. at 88.[3]

The Supreme Court determined "that the state interest in compensating injury to the reputation of private individuals requires that a different rule should" be utilized for private parties. *Gertz*, 418 U.S. at 343. In the three post-*Gertz* decisions of *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), this Court has consistently adhered to a restrictive approach to voluntary limited purpose public figure status, reversing the lower courts and holding that the plaintiffs were private individuals rather than limited purpose public

---

[2] See Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1030 (Winter 1996) ("[D]iscrepancies among lower court decisions should not be dismissed as random or capricious. Rather, they reflect in part divergent philosophies, or models, of the limited public figure doctrine: the formal model and the equitable model.")

[3] There is a "lack of a comprehensive definition or description of the term 'public figure' in the Supreme Court and the divergent case law in state and lower federal courts make the determination of a defamation plaintiff's status an uncertain process, differing from state to state and court to court." SACK, § 5.3.6, at 5-38.

figures.[4]

In *New York Times*, this Court held that the Constitution mandates "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'–that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

In *Gertz*, this Court summarized who will be considered to be a limited purpose public figure: "[A]n individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz*, 418 U.S. at 351. Public figures are less deserving of protection than private individuals because public figures, like public officials, have "voluntarily exposed themselves to increased risk of injury from the defamatory falsehood concerning them." *Wolston*, 443 U.S. at 164 (1979) (citing *Gertz*, 418 U.S. at 345).

A "limited purpose" or "vortex" public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. Unlike the all purpose public figure, the limited purpose public figure loses certain

---

[4] See generally RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.08, at 2-23 (1993) ("In the aftermath of *Gertz*, the Supreme Court undertook a series of refinements to the 'limited' public figure consistently giving the term an application more restricted in scope than the simple word 'public' might suggest as a matter of popular colloquial usage.").

protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. at 167.

This Court has determined that public official and "public figure" plaintiffs should have the same requirements for recovery. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967). However, this Court provided a negligence standard for defamation suits brought by private individuals in federal court, but left it up to the states to define for themselves the appropriate standard of liability for defamatory statements made about a private individual. *Gertz*, 418 U.S. at 347.

If *Pegasus* is allowed to stand, the teachings of the Supreme Court in *Gertz* and its progeny will be ignored and each state will determine for itself what constitutes a "private figure" for purposes of defamation.[5] The *Pegasus* decision does not allow for any business entity to protect its name from being taken by unwarranted and unsubstantiated media criticism, even factually false criticisms.

B. There Is Conflict Between the States and Circuits

The Nevada Supreme Court relies on a strict formula that provides that any entity offering "public accommodations" is not a private party and is, at the least, a "limited purpose public figure." *Pegasus*, 57 P.3d at 85. That court's determination directly conflicts with rulings of other states and circuit courts. The

---

[5] Judge Sack notes that there is a "lack of clarity and uniformity in application of public-figure concepts." SACK, § 5.3.7, at 5-39.

tension was clearly identified by the Fifth Circuit: "[T]he inquiry becomes even more difficult when the libel plaintiff is a corporation, as our prior cases do not establish a method for determining whether a corporation is a public or private figure." *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993), cert. dismissed, 511 U.S. 1050 (1994).

States have made decisions contrary to the Nevada ruling. Based on similar fact patterns, other state courts have found that restaurants are "private persons" for purposes of the First Amendment. For example, the Supreme Court of Appeals of West Virginia decided a similar case with almost the exact fact pattern and determined that the restaurant in question was a private figure. *Havalunch, Inc. v. Mazza*, 294 S.E.2d at 73. Havalunch was a small restaurant in a community with a large number of other restaurants. The West Virginia court determined that "a restaurant within one small university city where conceivably 20,000 persons routinely resort to public facilities" is not engaged "in a business of sufficient public concern to place it in the "public figure" or "public issue" category." *Id.* at 74. Merely providing public accommodations is not of sufficient public concern to warrant a restaurant's removal from the normal status of "private person." *Id.* at 73.

In Louisiana, a restaurant operator is not automatically a public figure for purposes of a defamation action against a restaurant critic. *Mashburn*,341 So.2d at 1236. Even though a plaintiff owned and operated a restaurant open to the public and advertised the restaurant publicly, such actions did not make the owner a public figure. The court found that the restaurant owner had in no way attempted to

influence society by the act of operating a restaurant business.[6] *Id.*

In Florida, the owner of a restaurant was determined to be a private figure and not a public figure for purposes of a defamation action even though he owned and advertised his restaurant business. *Rety v. Green*, 546 So.2d 410 (Fla. Dist. Ct. App. 1989), review denied, 553 So.2d 1165 (Fla. 1989). There, the owner, a private businessman who operated a restaurant and advertised his restaurant, was held to be a private party. *Id.* at 425. The court found that the restaurant owner was not a public figure prior to the controversy, and the plaintiff only became publicly prominent due to a letter written by the defendant. *Id.* That court found that if the plaintiff was not a limited public figure for First Amendment purposes prior to the controversy, the defendant in the defamation action could not make the plaintiff a limited public figure by the defamation. *Id.*

In Nebraska, four members of that state's highest court noted that "the trial court is wrong in holding that appellants [restaurant owners and restaurant] are public figures." *Silence v. Journal Star Printing Co.*, 266 N.W.2d 533 (Neb. 1978) (Spencer, White, Brodkey, White, J., concurring).

Other state courts have made opposite determinations more consistent with *Pegasus*. In Ohio, a restaurant owner was held to be a public figure for purposes of his activities in the operation of a public restaurant and opinions that might arguably reflect upon him because of the operation of the restaurant were subject to the test of actual malice. *Greer v. Columbus*

---

[6] Judge Sack's treatise recognized *Mashburn* as being contrary to the Petitioner's case. SACK, § 5.3.5, at 5-33 n.224.1.

Monthly Publ'g Corp., 448 N.E.2d 157 (Ohio Ct. App. 1982).

Circuits also disagree as to what constitutes a public figure for restaurants. In the Second Circuit, a restaurant plaintiff did "not contest its characterization as a public figure for purposes of First Amendment analysis" and that characterization was accepted by that court. *Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219, 230 (2d Cir. 1985).

This case also raises issues concerning the general constitutional status of plaintiffs who operate other businesses and provide other services. Courts have employed various particularized tests to determine whether corporate plaintiffs in a defamation action are public figures.[7]

The Nevada Supreme Court concluded "that restaurant owners, operating a place of public accommodation, have injected themselves into the public arena for purposes of a food review." *Pegasus*, 57 P.3d at 85. The Nevada Supreme Court determined that Petitioners were limited purpose public figures for any review written by a food critic.

However, the Supreme Judicial Court of Massachusetts found that a small business plaintiff, even if he provides public accommodations, is a private figure unless he voluntarily injects himself, or is drawn

---

[7] See *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), cert. denied, 449 U.S. 898 (1980); *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123 (2d Cir. 1984), cert. denied, 471 U.S. 1054 (1985); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985), cert. denied, 474 U.S. 864 (1985). In each of these cases determining whether the plaintiffs were limited purpose public figures, the courts considered the concept of defamation concerned controversies of public interest.

into a particular public controversy. *Shaari v. Harvard Student Agencies, Inc.*, 691 N.E.2d 925 (Mass. 1998). *Shaari* is directly contrary to the Pegasus ruling.

Cases which have found that small business owners are not public figures include the Supreme Judicial Court of Maine's determination that the constitutional status of a builder who was hired to construct a solar home was a "private figure." The builder there received "a fair amount of coverage in newspapers and magazines" concerning the building the home. *Haworth v. Feigon*, 623 A.2d 150, 158 (Me. 1993).

The Maine court found, however, that the builder received "little publicity from his work on it and certainly not the kind of fame that would allow him easy access to the media to rebut defamatory statements." *Id.* That court found that as a small businessman, the builder was dependent on his reputation, and was "especially vulnerable to disparaging comments on his conduct and the conduct of his business." *Id.* Finally, the court determined that the construction of a solar home "was not a public controversy in the ordinary sense [and the builder]* * * was not a public figure." *Id.*

In Oregon, "[M]erely opening one's doors to the public, offering stock for public sale, advertising, etc., even if considered a thrusting of one's self into matters of public interest, is not sufficient to establish that a corporation is a public figure." *Bank of Oregon v. Independent News, Inc.*, 693 P.2d 35, 42 (Or. 1985), cert. denied, 474 U.S. 826 (1985).

The public-figure question has arisen in other states with differing results. In *Jadwin v. Minneapolis Star & Tribune*, 390 N.W.2d 437 (1986), the Minnesota Supreme Court held that corporations who were involved in matters of public interest were limited-purpose public figures. However, the court determined that the principal director and shareholder of the

corporations were private figures.

In New Jersey, *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 516 A.2d 220, 227 (N.J. 1986), the court ruled that "constitutional concepts do not comfortably fit the activities or products of a corporation." In *Dairy Stores* a seller of water was held to be a public figure. The New Jersey court recognized that consumers have a first amendment interest in obtaining information regarding products and "a business which makes representations about the content, quality or safety of its products * * * invites attention and comment." The court concluded that when a consumer product has been placed into the public marketplace, a malice standard must be proven for recovery.

In the Fourth Circuit, a Bank was held to be a private figure because it could "not be considered a limited-purpose public figure absent the existence of a pre-defamation public controversy in which the plaintiff has become directly involved." *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 688 (4th Cir.1989).

The Eleventh Circuit held that "normal advertising" of a product does not automatically inject a company into a controversy concerning that product, even where the advertising includes information, such as a comparison of the company's prices and the products prices. Moreover, even attempts to influence the outcome of a controversy are not enough if those efforts fail to rise to a fairly high level of activity. *Long v.* Cooper, 848 F.2d 1202, 1205 (11th Cir. 1988).

The First Circuit found that "those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneurs." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 590 (1st Cir. 1980) (citation omitted). In *Bruno*, the media alleged that a large corporate fishing boat manufacturer made defective boats. The First

Circuit ruled that corporations, as a class, should not be characterized as public figures. The court noted that some corporations did not enjoy special advantaged access to the media and that the selling of a product could not amount to a public controversy.

In the District of Colombia, a court held that "a person can be a general public figure for purposes of defamation suit only if he is a 'celebrity' whose ideas and actions the public in fact follows with great interest." *Waldbaum*, 627 F.2d at 1292.

In *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir.1980), it was only after the plaintiff launched an intensive advertising campaign that the court deemed the company a public figure.

The Nevada Supreme Court's determination identifies the longstanding tension among the various states in defamation cases. "[T]he very existence of involuntary public figures stands in a kind of limbo; in an appropriate case, the Court should rule either that Gertz meant what it said, or that the Court's post-Gertz trilogy tacitly revoked that category of public figures." Stern, *supra* note 2, at1102. Lower courts, and the media, are unable to determine consistently among the states the constitutional status of businesses, including restaurants.

C. The Conflict Is Important

The conflict among the courts of several states and the federal circuits demonstrate a necessity for this Court to provide a national standard for determining the constitutional defenses permitted for defamatory statements. Each citizens constitutional status, and privileges for the media, should be determined in a uniform way and there should be uniformity among the states.

Once the determination of whether petitioners are public or private figures, a second question must then be answered as to whether the speech is "speech on matters of public concern," or "speech that is of a purely private nature." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). Without guidance from this Court, the *Pegasus* decision will provide authority that all small businesses should be treated as public figures thus setting a standard which may remove the protections of libel laws in most states.

II.
THERE IS A SPLIT BETWEEN THE NEVADA SUPREME COURT AND OTHER STATE COURTS IN DETERMINING WHAT IS A "MATTER OF PUBLIC CONCERN" FOR PURPOSES OF DEFAMATION

A. The Issue

Justice Brennan's dissenting opinion in *Dun & Bradstreet* notes that this Court has not clearly identified what is a "matter of public concern." 472 U.S. at 785. The lower courts thereafter have split on a "public concern" framework. A national framework is necessary because only matters of public concern "warrant [constitutional] protection from liability for defamation." *Gertz*, 418 U.S. at 333. The lower courts need guidance to correctly determine what is a "matter of public concern."[8]

---

[8] "A study in Florida conducted shortly after *Dun & Bradstreet* found editors and publishers disagreeing greatly over whether

In *Hutchinson*, this Court found that funding by the government coffers to do research is not always a matter of public concern. *Hutchinson v. Proxmire*, 443 U.S. at 135. Senator Proxmire's "Golden Fleece" award commemorating wasteful government spending may have raised a "concern about general public expenditures," but the award was insufficiently "particular" to satisfy the public controversy requirement. *Id.* A public controversy cannot be so broadly defined to force any recipient of a government research grant to be deemed a public figure.

Like the instant matter, the only media access or public attention that the plaintiff there received resulted from publicity foisted upon him by the defendant. This Court precluded defendants from creating their own defense by publicizing the plaintiff and indicated accordingly that public figure status should be measured by conditions prior to the alleged libel.

In contrast, the Nevada Supreme Court concluded "that a place of public accommodation has voluntarily injected itself into the public concern for the limited purpose of reporting on its goods and services." *Pegasus*, 57 P.3d at 92. *Hutchinson* does not support, nor do any of the cases cited by the Nevada court support, such a broad statement.[9]

---

particular factual scenarios constituted matters of public concern." *Defining "Public Concern" in Defamation Cases since Dun & Bradstreet v. Greenmoss Builders*, 43 FED. COMM. L.J. 1 n.8 (Dec. 1990) ("*W. Oates & D. Gordon*, The Revived 'Public Concern' Factor in Libel: Variability in Editors' Judgments 11, Paper presented to the AEJMC Southeast Regional Colloquium, Blacksburg, Va. (Mar. 1987)")

[9] The analysis would be different if there was a health concern. In Indiana, for example, the highest state court found that

To allow a party to take someone's good name and reputation under a claim of "public interest" privilege would allow the media free reign to determine what is newsworthy, after the defamation has been published. The "actual malice" standard places upon the plaintiff a high standard to meet if the media destroys that person's name. A public concern has to be more than protecting a false statement of fact, *viz.*, that there was a name brand can of beans on a shelf. Public discourse for such factual statements is nearly impossible.

B. The Conflict

There is a conflict between Nevada and Florida courts on whether the operation of a restaurant is strictly a matter of public concern. In Florida, reporting on the goods and services of a restaurant is not always a matter of public concern. This issue arose in a matter concerning a restaurant owner and a patron and their discussion of a meal provided in that restaurant. *Rety*, 546 So.2d at 414.

On facts similar to the instant case, the plaintiff in *Rety* was a private businessman who owned and operated a restaurant. That plaintiff also advertised his restaurant. The Florida Court held that such actions did not make the plaintiff a public personality in any sense. *Id.* at 425.

---

the "health status of a restaurant open to the public is plainly a matter of public concern." *Journal-Gazette Co. v. Bandido's, Inc.*,712 N.E.2d 446, 471 (Ind. 1999) (Boehm, J., concurring). Distinguishable from the Indiana case, the defamatory statements concerning Salsa Dave's was not about any health issue or the health status of the restaurant.

The Florida court made contrary determinations to *Pegasus* based on similar facts. The Florida court held that there is not a strict rule which requires that all matters related to the restaurant be deemed matters of public concern. *Id.* ("[A] private telephone conversation [between a restaurant owner and a customer concerning a meal served at the restaurant] –is hardly a matter of 'public concern.'"). The Nevada Supreme Court broadly held in the instant case that everything concerning goods and services in a restaurant is a matter of "public concern" if it is put in a restaurant review.

The *Pegasus* decision also conflicts with the teachings of this Court as *Gertz* makes clear that more than just injecting themselves into the public arena is required; rather, plaintiffs must "thrust themselves to the forefront" of the controversy so as to become factors in their ultimate resolution. *Gertz*, 418 U.S. at 345. Plaintiffs must have achieved a "special prominence" in the debate. *Id.* at 351. There is no evidence that Petitioners have thrust themselves to the forefront of a controversy. The issue is not being debated publicly and does not have foreseeable and substantial ramifications for nonparticipants.

The Supreme Court first decided a "matter of public concern" outside the defamation arena two hundred years ago in *Marbury v. Madison*, 5 U.S. 137, 168-69 (1803). Supreme Court decisions have indicated that there are limits to what is a "matter of public concern." See, *e.g.*, Justice Marshall's dissenting opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (noting that the plurality's decision may not protect private individuals from being thrust into the public's eye if they allowed "human events [which] are arguably within the area of 'public or general concern'"). Justice Marshall stated there was no provision for "guidelines or standards by which courts are to decide

the scope of public concern." *Id.* at 79.

In a 1952 dissent, Justice Black noted that speech of a public concern is protected by the First Amendment. *Beauharnais v. Ill.*, 343 U.S. 250, 272(1952). ("[E]very expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment.")

A restaurant review can rarely be a matter of "public concern" if it speaks merely of factual questions concerning food preparations. *See e.g. Terillo v. New York Newsday*, 519 N.Y.S.2d 914, 915 (N.Y. 1987) (the listing of incorrect ingredients is not protected speech). Private concerns or disagreements do not become public controversies simply because they attract attention. *Firestone*, 424 U.S. at 454-55. (Noting that *Time* sought to equate "public controversy" with all controversies of interest to the public" a position rejected by this Court).

This case does not concern a public controversy.[10] A public controversy is more than a celebrity divorce trial. *Firestone*, 424 U.S. at 453-54. A person enters into a public controversy only by attempting to influence the outcome of the controversy in the press rather than through the legal process. *Gertz*, 418 U.S. at 352. In this case, the only controversy was created by the Respondent's review.

On matters of public concern, private figure plaintiffs "must bear the burden of showing that the

---

[10] The controversy must be "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." *Waldbaum*, 627 F.2d at 1296. See generally DEFINING THE LIMITED PURPOSE PUBLIC FIGURE, 70 U. Det. Mercy L. Rev. 47, 54 (1992);

speech at issue is false before recovering damages for defamation from a media defendant." *Philadelphia Newspapers*, 475 U.S. at 777. A framework is required to provide guidance for the media because "unduly burdensome defamation laws could stifle valuable public debate." *Milkovich*, 497 U.S. at 13.

C. The Conflict is Important

The lower courts have not been consistent in deciding what constitutes a matter of "public concern." These courts, as well as the media and citizens, require guidance and a framework to permit them to consistently determine what constitutes a "matter of public concern" for the purposes of constitutional defenses to defamation claims.

Specifically whether it is the general rule "that a place of public accommodation has voluntarily injected itself into the public concern for the limited purpose of reporting on its goods and services?"

Lower courts should be instructed to exercise care in deciding what is a public concern. Newsworthiness alone will not suffice, for the alleged defamation itself indicates that someone in the press believed the matter deserved media coverage. Moreover, a court may not question the legitimacy of the public's concern; such an approach would turn courts into censors of "'what information is relevant to self-government.'" *Gertz*, 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)); *accord*, *Firestone*, 424 U.S. at 448. A vital part of open public debate is deciding what should be debated. No arm of the government, including the judiciary, should be able to set society's agenda. Thus, courts must look to what already was in dispute prior to the defamatory

statements. *See Hutchinson*, 443 U.S. at135.

III.
RESTAURANT REVIEWS OF A FACTUAL NATURE SHOULD NOT BE PROVIDED CONSTITUTIONAL PROTECTIONS FOR DEFAMATORY STATEMENTS

A. The Issue

Statements of opinion are provided full constitutional protection, as long as there is no provably false factual connotation. *Milkovich*, 497 U.S. at 2. "The First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws." *Id.* at 1. This Court has held that the reference to "opinion" in dictum in *Gertz*, 418 U.S. at 323, "was not intended to create a wholesale defamation exemption for 'opinion.'" *Milkovich*, 497 U.S. at 2.

Restaurant reviews are provided protections by lower courts that go beyond *Milkovich* making it virtually impossible for a restaurant plaintiff to prevail. See, *e.g.*, *Mr. Chow*, 759 F.2d at 230 (plaintiff could not cite "a single case that has found a restaurant review libelous"). Restaurant plaintiffs are rarely successful in bringing defamation actions against reviewers. See SMOLLA, *supra* § 6.88.

Some lower courts agree that an opinion review is, and should be, granted the same protections as other speech. *Id.* ("[C]ourts are loath to describe such [restaurant] reviews as anything other than opinion); *Greer*, 448 N.E.2d at 161 ("By its very nature, an article commenting upon the quality of a restaurant or its food, like a review of a play or a movie, constitutes the opinion of the reviewer.")

However, in cases such as the present, even when the review goes beyond what can logically be considered "opinion," the court provides protections beyond any opinion privilege. *Pegasus*, 57 P.3d at 89-90. In Nevada the statement that there was a name brand can of beans on shelf was found to constitute an "opinion." *Id.*

There is uncertainty in whether statements, factual on their face, concern opinion and such uncertainty will inevitably result in an unintended but real chilling effect on the press, or undercut defamation law. Clarity "in the area of free speech [is particularly important] for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech - the more elusive the standard, the less protection it affords." *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 657, 686 (1989).

Under the First Amendment, there is no such concept as a false idea. However, there is no constitutional value in false statements of fact. This Court has repeatedly stated, "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz*, 418 U.S. at 339-40 (quoting *New York Times*, 376 U.S. at 270). Opinions can be as damaging as an assertion of fact, and thus should be found libelous, if the writer indicates that she "has private, firsthand knowledge which substantiates the opinions he [she] expresses * * *" *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913, cert. denied, 434 U.S. 834 (1977).

Other privileges, such as a "fair comment" privilege, require that the statement to be protected must be recognizable by the ordinary reasonable person

as opinion and not as a statement of fact. See *Mashburn v. Collin*, 355 So.2d at 886; *Milkovich*, 497 U.S. at 19; *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1326 (Conn. 1982).

B. The Conflict

The question of protecting factual statements as opinion, *i.e.*, the ingredients and source of beans, identifies an issue that requires clarification from this Court. The Nevada Supreme Court found that "a review, by its very nature, constitutes the opinion of the reviewer." *Pegasus*, 57 P.3d at 87-88. In Nevada, "[i]f the published statements could be construed as defamatory statements of fact, and therefore actionable, then the jury should resolve the matter." *Id.* at 88. This court further stated, "[d]efamation is a publication of a false statement of fact."[11] *Id.* at 87.

In this case, the reviewer stated that the food came out of some sort of package and the "cost cutting measure applied to the ornamentation had spilled into the kitchen. The can of name-brand beans we [the reviewer] spy while paying our check confirms this." *Pegasus*, 57 P.3d at 89.

Petitioners contend that whether or not there was a "name-brand can of beans" on an upper kitchen

---

[11] Because the Nevada Court's grant of summary judgment was based on the law, the factual testimony concerning the magnitude of using canned beans in a Mexican restaurant, and the resultant effect on potential customers was not considered in the opinion. The question of whether accusing a Mexican restaurant of serving canned beans would be defamatory because it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt is an unanswered question ripe for determination.

shelf where the midday meal was being prepared is not an opinion, but a fact. If the reviewer stated that the food tasted like it came from a can, that would be an opinion.

That Nevada Court found that because the review "arguably also suggests that . . . [the reviewer] knows, rather than opines, that Salsa Dave's generally uses canned beans in the preparation of its food. While Salsa Dave's disputes that [the reviewer] could actually see a can of beans, they do keep canned beans on the premises. Therefore, the statement is substantially true." *Id.*

Judge Rose dissented in *Pegasus* because he noted that "the reporter went further [than giving her opinion] and stated that she saw a can of name brand beans in the kitchen. This is not an opinion, but a cold hard fact that gives credibility to the harsh opinions" she stated earlier in her review. *Pegasus*, 57 P.3d at 94. The dissent noted that "Salsa Dave's denied that they used canned beans that day and emphatically stated that there was no can of beans in sight in the kitchen. The fact that Pegasus admitted to having cans of beans in a cupboard on the premises for emergencies does not change the fact that the reporter said she saw the can, and that Salsa Dave's adamantly denied that fact." *Id.* at 94. Judge Rose found in his dissent that this "creates a factual issue that should be left to a jury, and I [Judge Rose] would remand this case so that factual determinations can be made concerning the can of beans allegedly seen in the kitchen." *Id.*

The courts in Massachusetts agree with the analysis of the Nevada courts. In *Pritsker v. Brudnoy*, 452 N.E.2d 227 (Mass. 1983), it was held that a reviewer's "comments would represent pure opinion, based on partly disclosed and partly assumed facts, and would not be actionable." *Id.* at 229.

The Court of Appeals of Ohio also agrees with the Nevada Court as evidenced by its holding in the *Greer* case, that the statements "[T]he salad, which comes with dinner, suffers a fate similar to that of the scallops in the 'coquille.' Dry, crisp lettuce, thinly sliced mushrooms and red cabbage have been overwhelmed by croutons from a can and dressing from a bottle" was not actionable. *Greer*, 448 N.E.2d at 159.

The highest court in New York, however, splits with these three jurisdictions. In New York, that court decided the protections to be afforded "restaurant reviews" does not extend to the ingredients of restaurant dishes. In New York whether a "statement is factual or is an opinion is to be determined through the eyes of the 'ordinary reader' of the statement." *Terillo*, 519 N.Y.S.2d at 915; see also *Mr. Chow*, 759 F.2d at 224 (quoting *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir.1976), cert. denied, 429 U.S. 1062 (1977).

The New York Court found that "the listing of incorrect ingredients of a reviewed restaurant dish by a newspaper's food critic is actionable libel to the restaurant or chef." *Terillo*, 519 N.Y.S.2d at 914. "The statement of ingredients is not metaphorical, metaphysical nor hyperbolic and is filled with facts capable of being objectively proven true or false. Therefore, this Court finds [that the review] is a factual statement not constitutionally protected in the manner of statements of opinion however unreasonable, extreme or erroneous." *Id.* at. 916. This ruling is directly contrary to the Nevada court's ruling in *Pegasus*.

C. The Conflict Is Important

The inconsistent applications of factual questions in the context of restaurant reviews are an important

issue. The media requires guidance that would be applicable across state lines. The media in various states across the nation is operating under a different constitutional standard than the media in Nevada.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to resolve these important issues.

Respectfully submitted,

William P. Farley*
John F. Karl, Jr.
McDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200
Counsel for Petitioners
*Counsel of Record

BEST AVAILABLE COPY

(Any footnotes trail the end of each document.)
No. 37291

SUPREME COURT OF NEVADA

DAVID PEGASUS AND BEVERLY PEGASUS,
INDIVIDUALS, D/B/A SALSA DAVE'S,
Appellants,

vs.

RENO NEWSPAPERS, INC.,
D/B/A RENO GAZETTE-JOURNAL,
Respondent.

November 7, 2002, Decided

COUNSEL: Law Office of Mark Wray, Reno, for Appellants.
Burton Bartlett & Glogovac, Reno, for Respondent.

JUDGES: BEFORE SHEARING, ROSE and BECKER, JJ. SHEARING, J., concurs. ROSE, J., concurring in part and dissenting in part.

OPINIONBY: BECKER
OPINION: By the Court, BECKER, J.:

Appellants, David and Beverly Pegasus, owned and operated Salsa Dave's, a Mexican-American eatery in Sparks, Nevada. Stacy Ferrante, a freelance journalist, wrote a negative review of Salsa Dave's, which was published in the Reno Gazette-Journal (RGJ). The review contained allegedly false factual allegations. The Pegasuses filed a complaint against the RGJ, asserting that Ferrante's review constituted defamation.

Following depositions, the RGJ moved for summary judgment. The district court granted the RGJ's motion, concluding that the review contained only a statement of opinion and was not actionable. In addition, the district court found that Salsa Dave's was a public figure for the limited purpose of a food review. Thus, the district court concluded that the Pegasuses had the burden of proving actual malice and that no facts existed to suggest actual malice on the part of the RGJ.

For the reasons set forth below, we conclude that the allegedly false statements were expressions of opinion. We further conclude that restaurant owners, operating a place of public accommodation, have injected themselves into the public arena for purposes of a food review. They are therefore limited-purpose public figures and, when defamation is alleged, must overcome the heightened actual malice standard of the First Amendment. We affirm the order of the district court.

FACTS

In September 1998 and April 1999, the RGJ published favorable restaurant reviews of Salsa Dave's. Thereafter, Ted Thomaidis, editor for the RGJ food section, wrote reviews or articles generally criticizing the use of canned beans or packaged ingredients in many Mexican-American restaurants. Thomaidis gave tips on identifying an authentic Mexican restaurant.

Subsequent to Thomaidis' articles, the RGJ published a third food review of Salsa Dave's. Stacey Ferrante authored the third review. Thomaidis was Ferrante's direct supervisor. The Ferrante review criticized the freshness of Salsa Dave's food and indicated that Ferrante saw a can of processed pinto beans in the kitchen while paying for her meal.

The Pegasuses wrote a letter to the RGJ in response to the review, requesting a retraction and publication of their letter. Included with the letter, they enclosed copies of invoices demonstrating that they purchased dry rather than canned pinto beans. The cover letter sought a conspicuous, appropriate correction in a timely manner. Jim Sloan, assistant managing editor of the RGJ, sent a letter to the Pegasuses indicating that, after careful consideration, the RGJ would not print a correction but would print the Pegasuses' letter to the editor. The letter to the editor was subsequently published.

On November 30, 1999, the Pegasuses filed a complaint against the RGJ, asserting that Ferrante's review contained the following defamatory statements:

1. I scooped out guacamole with my fork and dug in. One taste told me what I had feared: this pale green stuff was definitely not the real deal.

2. At this point my spouse pointed out what I was beginning to realize: "All this came out of some sort of package.

3. The cost cutting measure applied to the ornamentation had spilled into the kitchen. The can of name-brand beans we spy while paying our check confirms this.

The Pegasuses asserted that these are defamatory false factual statements and not protected opinion.

In its answer, the RGJ denied the Pegasuses' claims and asserted that the statements made by Ferrante were true and included matters of opinion that were privileged or were fair comment on matters of public interest.

Further, the RGJ asserted that the Pegasuses were public figures for purposes of the food review and therefore subject to an actual malice standard.

During discovery, testimony was presented concerning the use of packaged ingredients in Salsa Dave's food. Beverly Pegasus stated that, at the time the Ferrante review was written, the Pegasuses had one can of beans on the premises. Beverly also asserted that canned beans were only available for emergency use.

David Pegasus stated that he used some pre-packaged foods, including frozen avocado pulp, during periods when avocado was out of season, and that he kept several cans of commercially prepared pinto beans on the premises, but that the beans were not visible from the cashier booth. David asserted that it was not possible that Ferrante had canned beans in her lunch because he only kept the beans on the premises for emergency purposes; specifically, if he ran out late in the evening as a result of high dinner traffic. He also stated that he purchased four or five cans of beans for such purposes and that the can(s) were kept on a bottom shelf not visible from the customer service area. Finally, David stated that he might have been using frozen avocado pulp in his guacamole when Ferrante visited his restaurant.

Ferrante stated that she saw a can of canned beans in the kitchen through a louvered door while she was paying for her food. Ferrante stated that her husband, who had lunched with her, saw the can of beans first and then pointed it out to her.

Thomaidis stated that he verified with Ferrante every statement in her review, particularly regarding her witnessing the can of beans on Salsa Dave's premises,

and that he had no reason to doubt Ferrante's statement. He indicated he knew Ferrante and believed her to be an honest individual with no reason to fabricate a negative review of Salsa Dave's. He believed, based upon his past association with Ferrante, that her review was an honest expression of her opinion regarding Salsa Dave's food.

The Pegasuses presented no evidence that Ferrante, Thomaidis or anyone associated or employed with RGJ had bad feelings or a prior dispute with the Pegasuses or Salsa Dave's.

Relevant procedural history

Following depositions, the RGJ filed a motion for summary judgment. The RGJ asserted that the review regarding Salsa Dave's restaurant was only partially critical. The RGJ asserted that only two statements served as the basis for the lawsuit: (1) All of this came out of some sort of package; and (2) "The cost cutting measure applied to the ornamentation had spilled into the kitchen. The can of name-brand beans we spy while paying our check confirms this.

In its defense, the RGJ first asserted that the review, when taken as a whole, was an expression of Ferrante's opinion that the food tasted like it was pre-cooked or packaged. The RGJ argued that the statements, taken in context, were akin to hyperbole that could not have reasonably been interpreted by the reader as a statement of fact. As such, the RGJ asserted the review was absolutely protected speech under the First Amendment.

In addition, the RGJ contended that even if the statements could be considered as expressions of fact,

the Pegasuses had failed to establish a prima facie case of defamation because they could not prove that the RGJ had acted with actual malice, or that the allegedly defamatory statements made by the RGJ were false. The RGJ asserted that Salsa Dave's was a public figure for the limited purpose of a food review and that, therefore, an actual malice standard applied.

In their opposition, the Pegasuses stipulated that only these two statements were at issue. However, they asserted the statements were facts, not opinion. They also contested that they were public figures and that an actual malice standard applied to their claims. Finally, they argued that even if actual malice applies, they set forth sufficient facts to support a prima facie case of actual malice.

Relying on Nevada Independent Broadcasting v. Allen, n1 the Pegasuses claimed that they had sufficient evidence that the RGJ had acted with reckless disregard, including: (1) it published Ferrante's statement without attempting to verify the presence of canned beans with the Pegasuses; (2) Ferrante did not actually observe canned beans or other packaged ingredients being used in the preparation of her food; (3) Ferrante could not state for certain what brand of canned beans she saw on the premises; (4) Thomaidis asked Ferrante if she was sure beyond a reasonable doubt that she had seen the canned beans; (5) Ferrante did not make a second visit to Salsa Dave's as was Thomaidis' habit when he wrote a negative review; (6) Ferrante spent only an hour at Salsa Dave's; and (7) Salsa Dave's had received a positive review in the RGJ a month before Ferrante's visit.

In its reply, the RGJ contended that Salsa Dave's was a public figure for the limited purpose of a food review

because it actively advertised and sought commercial patronage. The RGJ asserted that the facts set forth in the opposition did not, as a matter of law, support a finding of actual malice and, therefore, summary judgment was appropriate.

The district court granted summary judgment in favor of the RGJ. The district court concluded that the statements were not factual assertions when made in the context of a restaurant review and constituted protected opinion. The district court also concluded that Salsa Dave's was a public figure for the limited purpose of a food review and that the Pegasuses therefore had the burden of proving that the RGJ acted with actual malice. The district court then determined that there were no facts demonstrating by clear and convincing evidence that the RGJ acted with actual malice.

DISCUSSION

This appeal presents two issues of first impression in Nevada. First, whether all comments published in a food review are constitutionally protected statements of opinion. Second, what constitutes a "public figure" for purposes of a defamation action?

I. Standard of review

This court's review of an order granting summary judgment is de novo. n2 Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. n3 "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party." n4

When a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue. n5 "The non-moving party's documentation must be admissible evidence," as "he or she 'is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.'" n6 However, all of the non-movant's statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition. n7

II. Restaurant reviews

Defamation is a publication of a false statement of fact. n8 Statements of opinion cannot be defamatory because "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." n9 This court has held that "statements of opinion as opposed to statements of fact are not actionable." n10 A review, by its very nature, constitutes the opinion of the reviewer. n11 Thus, the RGJ argues that even if an incorrect statement of fact is contained in a restaurant review, because it is a review and, as a whole, expresses an opinion, a misstatement of fact in the review cannot be actionable. We disagree.

We have previously stated that whether a statement is conditionally privileged is a question of law for the court n12 and should be reviewed de novo. n13 It is true that the term "review" conveys to the reader that the

statement is an expression of opinion and generally, only assertions of fact, not opinion, can be defamatory. n14 "However, expressions of opinion may suggest that the speaker knows certain facts to be true or may imply that facts exist which will be sufficient to render the message defamatory if false." n15 We see no reason why this same rule should not apply to statements in restaurant reviews. We agree, however, with the RGJ that statements made in a restaurant review should not be taken out of context. Rather, the review as a whole, and its essential nature as an expression of opinion, should be considered in weighing any allegation of defamatory import.

This court has held that a statement is not defamatory if it is an exaggeration or generalization that could be interpreted by a reasonable person as "mere rhetorical hyperbole." n16 Nor is a statement defamatory if it is absolutely true, or substantially true. n17 A statement is, however. defamatory if it "would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." n18

In determining whether a statement is actionable for the purposes of a defamation suit, the court must ask "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." n19 If the published statements could be construed as defamatory statements of fact, and therefore actionable, then the jury should resolve the matter. n20 However, this court has also stated that comments must be considered in context. n21

Here, the packaged goods and canned bean statements were a small portion of a lengthy review. The full text of

the review is as follows:

Located on the corner of Pyramid and McCarran and sharing a strip mall with a huge Raley's, Salsa Dave's neon sign is clearly visible from the street. I had seen it driving by a few times and my curiosity finally got the better of me. Upon my arrival, the owner, Dave Pegasus, greets me.

"Welcome to Salsa Dave's. I'm Dave, and there is the salsa," he says, indicating the salsa bar at the center of the room. I bet you say that to all the girls.

We are seated at the corner table by the window where we have a great view of the elaborate design. Where many Mexican restaurants fall into the category of Spartan decoration, this is the exception. A lovely painting by Dave's wife Beverly covers the wall I am sitting next to. Ornate hand painted vases adorn shelves. A female customer at the next table asks about the vases, apparently being a collector who knows their worth. To my eavesdropping delight, Dave tells her about his relative who does business in Mexico and traded them for the price of a few inexpensive appliances.

With all this attention paid to the decor, and the owner's obvious love of Mexico, I am looking forward to the food. My spouse orders the Cancun burrito with beef ($ 5.95) and I select the taco salad ($ 5.95). A basket of chips, warm and thin and crisp, arrives at our table. I take a trip to the salsa bar to sample the wares. There are four kinds, ranging from mild to hot, including a salsa verde made with tomatillos. Juggling them back to the table in little cups, I start to forget which is which. Unfortunately, the three red salsas are almost identical in color and texture. It would have been great if some

were chunkier than others. Although the verde was classified as medium, I experienced it as hotter than the hot salsa, but that may have been due to its more distinct flavor.

Then the most puzzling thing happens. When our food arrives, it does not live up to the colorful mural I have my back against.

My husband's white burrito arrives overrun with olives, which he silently begins to herd to the side. They bump into the diminutive portion cups of sour cream and guacamole, which are leveled off sharply at the top.

The taco salad comes in a tostada shell, and the salsa salad dressing wins points. I scooped out the guacamole with my fork and dug in. One taste told me what I had feared: This pale green stuff was definitely not the real deal.

At this point my spouse pointed out what I was beginning to realize: "All of this came out of some sort of package."

Recalling now the charming story of where those vases came from, I glanced at them. The cost cutting measure applied to the ornamentation had spilled into the kitchen. The can of name-brand beans we spy while paying our check confirms this. I'll say this for the benefit of all concerned; I'll pay a bit more if you live up to the potential of your vision.

We conclude that the district court did not err in finding the statement that the food came from a package, taken in context together with the tenor of the entire work, is an expression of opinion. A reasonable person reading the review would understand that Ferrante's opinion

about the freshness of the ingredients was based on her consumption of the food. It conveyed Ferrante's opinion that the food was pre-packed rather than an implied statement that she had observed the food coming from a package. Therefore, we conclude that the statement, "all of this came out of some sort of package," is not actionable.

The statement regarding canned beans presents a closer issue. Ferrante does not state that canned beans are used in the preparation of Salsa Dave's food, merely that the existence of the can of beans confirms her earlier opinion that the food is pre-packaged. However, it arguably also suggests that Ferrante knows, rather than opines, that Salsa Dave's generally uses canned beans in the preparation of its food. While Salsa Dave's disputes that Ferrante could actually see a can of beans, they do keep canned beans on the premises. Therefore, the statement is substantially true.

The district court considered this, together with the entirety of the article, in finding that the statement was purely opinion. We agree. When read in the context of the entire review, a reasonable person would understand the statement to be an expression of Ferrante's belief that canned beans had been used in the preparation of the food, rather than a statement of fact. The only statement of fact that might have defamatory import is that there are canned beans on the premises, which implies canned beans are used in some fashion in the preparation of the food. Since, even if factual, this is a true statement, and the rest of the article is a statement of opinion, we conclude that the district court did not err in finding the statements to be non-actionable.

It is these factors that distinguish this case from our

holdings in Lubin v. Kunin n22 and Wynn v. Smith. n23 Neither Lubin nor Wynn involved alleged defamatory statements in the context of a review. The contested statements in those cases were capable of defamatory import far more egregious in nature than the presence of canned beans in a restaurant kitchen. Lubin involved accusations of child abuse while Wynn involved allegations that an individual was a front for organized crime. Moreover, both cases involve the character of individuals, not a comment on the quality of the goods or services of a commercial establishment. Finally, the true facts in those cases were substantially different from the defamatory inferences created by misleading or confusing text. Here, even assuming Ferrante did not see the can of beans, the true facts that canned beans are kept in the kitchen are essentially identical with the allegedly false statement that Ferrante saw a can of beans in the kitchen. Accordingly, the district court did not err in granting summary judgment as a matter of law.

III. Defamation - public v. private figures

The general elements of a defamation claim require a plaintiff to prove: "(1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." n24

With the adoption of the First Amendment's free speech provisions to the United States Constitution, the United States Supreme Court was forced to determine how the First Amendment interacted with the common law of defamation. Initially, the High Court suggested that the First Amendment did not protect against false statements and was not implicated in a defamation

action. n25 However, in the landmark case of New York Times Company v. Sullivan, n26 the Supreme Court concluded that the negligence standard was too broad when applied to defendants who were commenting about the actions of a public official. To promote free criticism of public officials, and avoid any chilling effect from the threat of a defamation action, the High Court concluded that a defendant could not be held liable for damages in a defamation action involving a public official plaintiff unless "actual malice" is alleged and proven by clear and convincing evidence. n27 Actual malice has been defined as "knowledge that it [the statement] was false or with reckless disregard of whether it was false or not." n28 Reckless disregard means that the publisher of the statement acted with a "'high degree of awareness of . . . [the] probable falsity'" of the statement or had serious doubts as to the publication's truth. n29

After New York Times, the Supreme Court extended heightened First Amendment protection to individuals who were not public officials, but who were involved in issues of public concern. These persons were designated as "public figures" by the High Court. n30 The Supreme Court further addressed the issue of public figures in Rosenbloom v. Metromedia. n31 In a plurality opinion, the Rosenbloom Court suggested that public figure status applies to any individual involved in a matter of general or public interest. n32 Three years later, the Court retreated from the broad definition of a public figure espoused in Rosenbloom.

In Gertz v. Robert Welch, Inc., n33 the United States Supreme Court clarified the definition of a public figure. The Gertz Court reiterated that the New York Times standard applies only to public officials and public figure plaintiffs, not to private plaintiffs, and that states

may define for themselves the appropriate standard of liability when a publisher or broadcaster makes a defamatory statement that injures a private individual. n34 The Gertz Court created two categories of public figures. General public figures are those individuals who "achieve such pervasive fame or notoriety that [they] become[ ] a public figure for all purposes and in all contexts." n35 Limited public figures are individuals who have only achieved fame or notoriety based on their role in a particular public issue. n36

A limited-purpose public figure is a person who voluntarily injects himself or is thrust into a particular public controversy or public concern, and thereby becomes a public figure for a limited range of issues. n37 The test for determining whether someone is a limited public figure includes examining whether a person's role in a matter of public concern is voluntary and prominent. n38 Specifically, the Gertz Court stated:

We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame and notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. n39

We adopt the Gertz test for determining whether a person is a general-purpose or a limited-purpose public figure. Based on the language contained in Rosenbloom and Gertz, state courts have considered whether a restaurant is a public figure for the limited purpose of

reporting on the quality or condition of the restaurant's services. For example, in Journal-Gazette Co. v. Bandido's, Inc., n40 a Mexican-American restaurant brought a defamation suit against a local newspaper after it published a story entitled "Health board shuts doors of Bandido's # 8213; Inspectors find rats, roaches at local eatery." n41 The Indiana Supreme Court, pursuant to Gertz, adopted the actual malice standard and concluded that Bandido's was a limited-purpose public figure:

Restaurants and other establishments that actively advertise and seek commercial patronage have been routinely held to be public figures, at least for the limited purpose of consumer reporting on their goods and services. Hence, while Bandido's may not necessarily have been a public figure before the health department closed the restaurant, we find that it certainly became a public figure for the limited purpose of issues concerning the health department's report and the circumstances giving rise to the closing of the restaurant. n42

Several other jurisdictions have adopted the same rationale in regard to restaurants and restaurant reviews. n43 These courts have indicated that because a restaurant is a place of public accommodation that seeks public patrons, it is a public figure for the limited purpose of a food review or reporting on its goods and services. We agree with our sister states' rationale that a place of public accommodation has voluntarily injected itself into the public concern for the limited purpose of reporting on its goods and services. Here, Salsa Dave's is a limited-purpose public figure because it has voluntarily entered the public spectrum by providing public accommodation and seeking public patrons. Thus, it is a limited public figure for the purpose of a

food review. Therefore, we conclude that Salsa Dave's had the burden of proving that the RGJ acted with actual malice when it printed the Ferrante review in order to sustain an action for defamation against the RGJ.

IV. Actual malice

Having concluded that Salsa Dave's is a limited public figure, we turn to the district court's finding that Salsa Dave's failed to present evidence of actual malice. The question of actual malice goes to the jury only if there is sufficient evidence for the jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice. n44 As noted above, actual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity. n45 Reckless disregard for the truth may be found when the "defendant entertained serious doubts as to the truth of the statement, but published it anyway." n46 This test is a subjective one, relying as it does on "what the defendant believed and intended to convey, and not what a reasonable person would have understood the message to be." n47 Recklessness or actual malice may be established through cumulative evidence of negligence, motive, and intent. n48

In the present case, the Pegasuses assert that they had cumulative evidence demonstrating actual malice. We disagree. The Pegasuses' evidence at most suggests a lack of concern on the part of the RGJ over the effect the review might have on Salsa Dave's. The issue is what the RGJ believed and intended to convey at the time it published the review. n49 Here, there is no indication that the RGJ published the Ferrante review with the knowledge that it was false or that it entertained serious doubts about the veracity of the statements contained in

Ferrante's review. n50

Even assuming there is sufficient evidence to argue that Ferrante's statement regarding the can of beans was false, there is no evidence that Thomaidis, or anyone else at the RGJ, had any reason to believe Ferrante would lie in her review. Thomaidis indicated that he asked Ferrante about the beans only because he wanted to be sure she personally saw the beans and was not relying upon what someone else may have told her, not because he doubted her veracity. Moreover, the fact that a different reviewer gave Salsa Dave's a positive rating does not establish that the RGJ should have known that Ferrante's review was anything other than an honest difference of opinion. Thus, the Pegasuses provided no evidence suggesting that the RGJ acted with actual malice or reckless disregard for the truth at the time it published the review of Salsa Dave's. n51

The Pegasuses rely heavily on the fact that Thomaidis' previous articles had demonstrated a dislike for canned or pre-packaged ingredients in Mexican-American restaurants and that the use of such items meant the food was not authentic Mexican cuisine. The Pegasuses also argue that Thomaidis should have conducted an investigation and insisted on a second visit to the restaurant before publishing a negative review. None of these things establish actual malice.

Thomaidis' opinions about authentic Mexican food do not demonstrate that he had any dispute with Salsa Dave's prior to the review. There is no evidence that he had animosity towards Salsa Dave's and targeted it over any other Mexican-American restaurant. At most, the evidence demonstrates Thomaidis was interested in reviewing restaurants that served Mexican food and determining if they were "authentic" using his criteria.

The same is true of the allegations that Thomaidis should have done more investigation. Indeed, failure to investigate alone, or to read other previously printed material is not grounds for a finding of actual malice. n52 Given the clear and convincing standard, the record demonstrates there is insufficient evidence to support a finding that Thomaidis or anyone else at the RGJ entertained a serious doubt as to the truth of Ferrante's observations or the honesty of her opinion. The district court did not err in concluding that the Pegasuses' evidence, viewed in the light most favorable to the Pegasuses, was insufficient as a matter of law to support a claim for defamation.

CONCLUSION

We conclude that comment in a restaurant review is not automatically protected opinion simply because it is contained in a review. However, such comments must be viewed in the context of the review as a whole and not as an individual statement. When a reasonable person, reading a restaurant review, would recognize that the comments contained therein are the opinions of the writer and not blanket statements of fact, the comments are privileged. Moreover, for the purpose of a review, restaurants are limited-purpose public figures.

Accordingly, the order of the district court granting summary judgment is affirmed.

Footnotes

n1 99 Nev. 404, 415, 664 P.2d 337, 344-45 (1983) ("Evidence of negligence, motive, and intent may be used, cumulatively, to establish the necessary recklessness. It is clear that in most instances one factor

alone will not establish actual malice by convincing clarity." (citation omitted)).

n2 Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

n3 NRCP 56; see also Great American Ins. v. General Builders, 113 Nev. 346, 350-51, 934 P.2d 257, 260 (1997).

n4 Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

n5 NRCP 56(e); see also Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981).

n6 Posadas, 109 Nev. at 452, 851 P.2d at 442 (quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

n7 Great American Ins., 113 Nev. at 351, 934 P.2d at 260.

n8 Posadas, 109 Nev. at 453, 851 P.2d at 442.

n9 Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

n10 Nevada Ind. Broadcasting, 99 Nev. at 410, 664 P.2d at 341.

n11 Greer v. Columbus Monthly Pub. Corp., 4 Ohio App. 3d 235, 4 Ohio B. 426, 448 N.E.2d 157, 161 (Ohio Ct. App. 1982).

n12 Circus Circus Hotels v. Witherspoon, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983).

n13 See SIIS v. United Exposition Services Co., 109 Nev.

28, 30, 846 P.2d 294, 295 (1993) ("Questions of law are reviewed de novo.").

n14 K-Mart Corporation v. Washington, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993).

n15 Id. (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 21-22, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990)).

n16 Wellman v. Fox, 108 Nev. 83, 88, 825 P.2d 208, 211 (1992).

n17 See Mark v. Seattle Times, 96 Wn.2d 473, 635 P.2d 1081, 1092 (Wash. 1981). The doctrine of substantial truth provides that minor inaccuracies do not amount to falsity unless the inaccuracies "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Specifically, the court must determine whether the gist of the story, or the portion of the story that carries the "sting" of the article, is true. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991) (internal quotes and citation omitted).

n18 K-Mart Corporation, 109 Nev. at 1191, 866 P.2d at 281-82.

n19 Nevada Ind. Broadcasting, 99 Nev. at 410, 664 P.2d at 342. Additionally, a federal district court, applying Nevada law, enunciated three factors for determining whether an alleged defamatory statement includes a factual assertion: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible to being proved true or false.

Flowers v. Carville, 112 F. Supp. 2d 1202, 1211 (D. Nev. 2000).

n20 Posadas, 109 Nev. at 453 n.2, 851 P.2d at 442 n.2 (citing Milkovich, 497 U.S. at 21-22).

n21 Nevada Ind. Broadcasting, 99 Nev. at 412, 664 P.2d at 343 (quoting Cianci v. New Times Publishing Co., 639 F.2d 54, 67 (2d Cir. 1980)).

n22 117 Nev. 107, 17 P.3d 422 (2001).

n23 117 Nev. 2, 16 P.3d 424 (2001).

n24 See Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459, 462 (1993).

n25 Konigsberg v. State Bar, 366 U.S. 36, 49, 6 L. Ed. 2d 105, 81 S. Ct. 997 & n.10, 366 U.S. 36, 6 L. Ed. 2d 105, 81 S. Ct. 997 (1961); Times Film Corp. v. Chicago, 365 U.S. 43, 48, 5 L. Ed. 2d 403, 81 S. Ct. 391 (1961); Roth v. United States, 354 U.S. 476, 486-87, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266, 96 L. Ed. 919, 72 S. Ct. 725 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); Near v. Minnesota, 283 U.S. 697, 715, 75 L. Ed. 1357, 51 S. Ct. 625 (1931).

n26 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

n27 Id. at 279-80.

n28 Id. at 280.

n29 St. Amant v. Thompson, 390 U.S. 727, 731, 20 L. Ed.

2d 262, 88 S. Ct. 1323 (1968) (quoting Garrison v. Louisiana, 379 U.S. 64, 74, 13 L. Ed. 2d 125, 85 S. Ct. 209 (1964)).

n30 Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) (noting that a head coach of a state university was a public figure for purposes of reporting on game fixing).

n31 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971).

n32 Id. at 43 (plurality opinion).

n33 418 U.S. 323, 342-43, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

n34 Id. at 343-47.

n35 Id. at 351.

n36 Id. at 351-52.

n37 Id. at 351.

n38 Id. at 351-52; see also Curtis Publishing, 388 U.S. at 154-55 (plurality opinion); id. at 164 (Warren, C.J., concurring in result).

n39 Gertz, 418 U.S. at 352; see also Tavoulareas v. Piro, 260 U.S. App. D.C. 39, 817 F.2d 762, 772 (D.C. Cir. 1987) (concluding that a general-purpose public figure is strictly construed as someone who is a household name in the community like a movie celebrity or an athlete).

n40 712 N.E.2d 446 (Ind. 1999).

n41 Id. at 449-50.

n42 Id. at 454 (citations omitted).

n43 See, e.g., Greer, 448 N.E.2d at 162; Steak Bit of Westbury, Inc. v. Newsday, Inc., 70 Misc. 2d 437, 334 N.Y.S.2d 325, 330 (Sup. Ct. 1972); Twenty-Five E. 40th St. Rest. Corp. v. Forbes, Inc., 37 A.D.2d 546, 322 N.Y.S.2d 408, 409 (App. Div. 1971). These cases affirmatively establish that a private figure must prove actual malice when the subject matter of the speech is an issue of public concern. See also Rodney A. Smolla, Law of Defamation § 3.11 (1989); see generally El Meson Espanol v. NYM Corporation, 389 F. Supp. 357, 358 (S.D.N.Y. 1974) (concluding that a restaurant which serves food to the general public is engaged in an enterprise of public interest); Mashburn v. Collin, 355 So. 2d 879, 889-90 (La. 1977) (concluding that a restaurant review was an expression of opinion and was privileged unless published with knowing or reckless falsity); Havalunch, Inc. v. Mazza, 170 W. Va. 268, 294 S.E.2d 70, 74-75 (W. Va. 1981) (concluding that a humorous restaurant review was protected by the doctrine of fair comment); John C. Williams, Annotation, Liability for Defamation for Criticizing Restaurant's Food, 96 A.L.R.3d 609 (1980 & Supp. 2001).

n44 Nevada Ind. Broadcasting, 99 Nev. at 414, 664 P.2d at 344.

n45 See New York Times, 376 U.S. at 279-80; Posadas, 109 Nev. at 454, 851 P.2d at 443 (citing Nevada Ind. Broadcasting, 99 Nev. at 414, 664 P.2d at 344).

n46 Posadas, 109 Nev. at 454, 851 P.2d at 443.

n47 Id. This rule is distinguished from the rule regarding assertions of fact versus assertions of opinion. See Nevada Ind. Broadcasting, 99 Nev. at 410, 664 P.2d at

341-42. Generally, only assertions of fact, not opinion, can be defamatory. Specifically, the rule for distinguishing an opinion from an assertion of fact is "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." Id. at 410, 664 P.2d at 342.

n48 Posadas, 109 Nev. at 454, 851 P.2d at 443 (citing Nevada Ind. Broadcasting, 99 Nev. at 415, 664 P.2d at 344).

n49 Id.; see also 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 5.5.1 (3d ed. 2002).

n50 See Posadas, 109 Nev. at 454, 851 P.2d at 443.

n51 See Greer, 448 N.E.2d at 162-63.

n52 Gertz, 418 U.S. at 332; New York Times, 376 U.S. at 287.

SHEARING, J., concurs.
CONCURBY: ROSE (In Part)
DISSENTBY: ROSE (In Part)
DISSENT: ROSE, J., concurring in part and dissenting in part:

I agree with the majority opinion when it states the law defining a limited public figure and the general legal discussion of what constitutes a fact or an opinion. I disagree, however, in the majority's application of these principles to the facts of this case. For this reason, I concur in part and dissent in part.

Ms. Ferrante, a Reno Gazette-Journal reporter, asserted her strong opinion that Salsa Dave's Mexican food "was definitely not the real deal" and that one entree tasted as if it "came out of some sort of package. These opinions are legally fair enough. However, the reporter went further and stated that she saw a can of name brand beans in the kitchen. This is not an opinion, but a cold hard fact that gives credibility to the harsh opinions stated.

Salsa Dave's denied that they used canned beans that day and emphatically stated that there was no can of beans in sight in the kitchen. The fact that Pegasus admitted to having cans of beans in a cupboard on the premises for emergencies does not change the fact that the reporter said she saw the can, and that Salsa Dave's adamantly denied that fact.

This creates a factual issue that should be left to a jury, and I would remand this case so that factual determinations can be made concerning the can of beans allegedly seen in the kitchen. If it were shown that the reporter was lying, a sufficient basis for malice or a reckless disregard for the truth would be shown when coupled with such facts as the Reno Gazette-Journal not having visited the restaurant a second time before writing the negative review, as was its usual practice.

No. 37291

IN THE SUPREME COURT OF
THE STATE OF NEVADA

DAVID PEGASUS AND BEVERLY PEGASUS,
INDIVIDUALS, D/B/A
SALSA DAVE'S,
Appellants

v.

RENO NEWSPAPERS, INC., D/B/A
RENO GAZETTE-JOURNAL,
Respondent.

Filed February 20, 2003

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A.

Accordingly, we ORDER the petition DENIED.

Agosti, C.J.

Shearing, J.

Rose, J.

Leavitt, J.

Becker, J.

Gibbons, J.

Maupin, J.

cc:
Hon. Brent T. Adams, District Judge
Law Office of Mark Wray
Burton Bartlett & Glogovac
Washoe District Court Clerk

Supreme Court No. 37291
District Court Case No. CV9906217

IN THE SUPREME COURT OF
THE STATE OF NEVADA

DAVID PEGASUS AND BEVERLY PEGASUS,
INDIVIDUALS, D/B/A
SALSA DAVE'S,
Appellants

v.

RENO NEWSPAPERS, INC., D/B/A
RENO GAZETTE-JOURNAL,
Respondent.

REMITTITUR

TO: Ronald A Longtin, Jr., Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 25, 2003
Janette M. Bloom, Clerk of Court

By:
Chief Deputy Clerk

cc: Hon. Brent T. Adams. District Judge
Burton Bartlett & Glogovac
Law Office of Mark Wray

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom. Clerk of the Supreme Court of the State or Nevada, the REMITTITUR issued in the above-entitled cause, on_____.

District Court Clerk

Code No. 3060
IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
Case No. CV99-06217
Dept. No. 6

DAVID PEGASUS AND BEVERLY PEGASUS,
INDIVIDUALS, D/B/A
SALSA DAVE'S,
Appellants

v.

RENO NEWSPAPERS, INC., D/B/A
RENO GAZETTE-JOURNAL,
Respondent.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

The court has read and considered the memoranda and exhibits submitted in support of and in opposition to defendant, Reno Gazette-Journal's Motion for Summary Judgment, filed December 1, 2000, and submitted for decision on December 22, 2000.

Summary judgment is appropriate only when the moving party is entitled to judgment as a matter of law, and no genuine issue remains for trial. Shepard v. Harrison, 100 Nev. 178, 179, 678 P.2d 670, 672 (1984). The district court must exercise caution in granting summary judgment, as [a] litigant has the right to trial where there is the slightest doubt as to the facts." Id. at 180.

Further, "the non-moving party must, by affidavit or otherwise, set forth specific facts demonstrative the

existence of a genuine issue for trial or have summery judgment entered against him. Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 825 P.2d 588 (1992). Finally, a party is not entitled to build its case on "gossamer threats of whimsy, speculation, and conjecture." 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

Salsa Dave's is a public figure for the limited purpose of a food review. See Greer v. Columbus Monthly Publishing Corp., 448 N.E.2d 157, 162 (Ohio Ct. App. 1982) Steak Bit of Westbury, . y.. Newsday, Inc., 334 N.Y.S.2d 325, 330 (N.Y.Sup. Ct. 1972); Twenty-Five East 40th Street Restaurant Corporation v. Forbes, Inc., 322 N.Y.S.2d 408, 409 (N.Y.App.Div. 1971). Because Salsa Dave's is a public figure for the purposes of this case, Salsa Dave's has the burden to prove by clear and convincing evidence, that the Reno Gazette-Journal acted with "actual malice." Nevada Independent Broadcast Corp. v. Allen, 99 Nev. 404, 414, 664 P.2d 337 (1983).

Actual malice is defined as "knowledge of the falsity of the statement or a reckless disregard for the truth." (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), Actual malice has not been established. There are no facts that suggest the Reno-Gazette acted with knowledge of falsity or a reckless disregard for the truth with respect to the restaurant review.

In addition, the Reno Gazette's restaurant review is a publication of opinion, and is, therefore, not actionable. Wellman v. Fox 108 Nev. 83, 86, 825 P.2d 208 (1992) (citing Allen, 99 Nev. at 410, 418 U.S. 323, 339 (1974)).

Accordingly, defendant's motion for summary judgment is granted.

DATED this 29th day of December 2000.
District Judge